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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1957 Nos. 435 and 436

FEDERAL TRADE COMMISSION, PETITIONER

v.

NATIONAL CASUALTY COMPANY

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE AMERICAN HOSPITAL
AND
LIFE INSURANCE COMPANY

On Writs of Certiorari to the United States Courts of Appeals for the Fifth and Sixth Circuits

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BRIEF OF ATTORNEY GENERAL OF MICHIGAN, AMICUS CURIAE

In Which the Several States Shown on the Appendix Have Joined Through Their Attorneys General (Names of Other Attorneys General see Reverse Side of Cover)

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INTEREST OF THE STATES

For over 100 years the states have had the responsibility for the regulation of the insurance business. During most of that time, insurance was not considered to be commerce. The federal government was without power to regulate insurance under the commerce clause, and the states had full regulatory power unrestricted by the commerce clause. In *United States v. South-Eastern Underwriters Assn.*, 322

US 533 (1944), the Supreme Court for the first time held insurance to be commerce. Nine months later Congress enacted the McCarran Act.

Over this long period of time the states have developed comprehensive regulatory systems governing insurance. Each state has an insurance department headed by a state official and staffed by examiners, actuaries and others experienced in the insurance business. Each state has a detailed set of laws designed specifically for regulation of this business. These laws govern all aspects of the business, including such matters as the licensing of companies and agents, approval of policy forms, examination of financial stability, regulation of reserve requirements, supervision of investments, election of officers and directors, regulation of unfair or deceptive acts or practices, and, in the cases of some types of insurance, the rates which may be charged.

As one part of this regulatory system, the states have for many years concerned themselves with insurance advertising. Prior to the McCarran Act, most of the states had provisions in their insurance codes regulating such advertising in one form or another. Subsequent to that Act, a great majority of the states adopted the Model State Fair Trade Practices Act, which is patterned after the Federal Trade Commission Act, contains the same broad proscription against all "unfair methods of competition or unfair or deceptive acts or practices," and specifically prohibits the use of misleading advertising in connection with all types of insurance. This Model Act was sponsored by the National Association of Insurance Commissioners and was enacted by the states for the specific purpose of accepting the invitation to state regulation expressed by Congress in the McCarran Act. At present, the Model Act is in force in 41 states, Alaska, Hawaii and Puerto Rico; five other

states and the District of Columbia have statutes which, although differing somewhat from the Model Act, specifically regulate all insurance advertising; and two states have statutes which specifically regulate the advertising of life insurance companies plus general statutes which prohibit misleading advertising in connection with anything offered to the public for sale.

In the two cases at bar, the Federal Trade Commission has held, in three-to-two decisions, that despite the McCarran Act it has jurisdiction over all advertising used in connection with the interstate sale of insurance regardless of the existence of state statutes regulating the same advertising. In its decisions and in the Courts below, the Commission rested this conclusion on the premise that the states have no power to regulate the "interstate aspect" of transactions "in" interstate commerce. In its brief in this Court, the Commission shifts to the contention that the states cannot "effectively" regulate interstate insurance transactions, so that in the absence of federal control there would be a regulatory void. It also argues that the McCarran Act should be construed to mean that the Federal Trade Commission Act is applicable to insurance to the extent that the business is not regulated by "inconsistent" state law.

The position of the Commission seriously concerns the states for at least three reasons:

First, the broad contention that the states cannot effectively regulate interstate insurance transactions is a challenge to the efficacy of all state regulation. In the McCarran Act, Congress "put the full weight of its power behind" state legislation, as this Court held in *Prudential Insurance Co. v. Benjamin*, 328 US 408, 431 (1946). Yet the Federal Trade Commission now says that nevertheless there would

be a regulatory void in the absence of concurrent federal regulation. If this is true of the business of insurance, it would be doubly true of state regulation in other fields where commerce clause inhibitions have not been removed. The net effect of the Commission's position is that whenever interstate commerce is involved the states are powerless to protect even their own citizens, and only the federal government can do so.

Second, the Commission's decision would nullify both the basic purpose and the express language of the McCarran Act. The Act declares "that the continued regulation and taxation by the several States of the business of insurance is in the public interest," and that "the business of insurance • • • shall be subject to the laws of the several States which relate to the regulation or taxation of such business." The states have acted in the belief that by this language Congress meant that the states (not the federal government) should have the responsibility for the regulation of the insurance business. More specifically related to the present issue, the proviso of Section 2(b) of the McCarran Act states that after the moratorium period the Federal Trade Commission Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." The states have understood this provision to be an invitation to the states to enact legislation covering the area of the Federal Trade Commission Act, and a declaration that to the extent the states do so the federal Act shall not be applicable. Pursuant to this invitation, the states have since the enactment of the McCarran Act adopted numerous statutes designed to regulate in this area and thereby make federal regulation unnecessary. The instant decisions of the Federal Trade Commission, however, result in nullifying the invitation and declaration by saying that state laws in this interstate area are ineffective and state

action in adopting regulatory statutes of this nature are nugatory in so far as Commission jurisdiction is involved.

Third, the conclusion of the Commission that both state and federal laws should be applicable to interstate insurance transactions so long as the statutes are consistent would necessarily lead to duplicative and conflicting regulation. The instant circumstances provide a good example. Both the Federal Trade Commission Act and the state statutes broadly proscribe "unfair methods of competition" and "unfair or deceptive acts or practices." Both are enforceable initially by administrative agencies. As applied to offensive advertising, duplicative restraining orders would be unnecessary and wasteful. Conflicting orders would lead to endless controversy and confusion, resulting in serious impairment of purposeful state regulation.

SUMMARY OF ARGUMENT

The proviso of Section 2(b) of the McCarran Act states that the Federal Trade Commission Act and the other federal Acts there named "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." Despite this language, the Commission has held that it has jurisdiction over all advertising used in connection with the interstate sale of insurance regardless of the existence of state laws regulating the same advertising in every state in which it is used.

The Commission concedes that the states have the power to regulate interstate insurance transactions without limitation from the commerce clause. It also concedes that under the proviso the Federal Trade Commission Act would be inapplicable in the case of a conflict with state laws.

The Commission argues, nonetheless, that despite this broad authority in the States, it has an area of jurisdiction over the business of insurance to the extent that such business is not regulated by "inconsistent" state law. It also argues that the states cannot effectively regulate interstate insurance advertising, thus the proviso should be construed to mean that the federal Act is applicable to the extent that the business is not "effectively" regulated by state law. Neither argument has merit. The Commission's assumptions are gratuitous on this record and its construction of the McCarran Act distorts its meaning and purpose.

I

The Commission's argument that the proviso of Section 2(b) should be interpreted to mean that the Federal Trade Commission Act is applicable in the absence of inconsistent state law, is contrary to the language, the purpose and the legislative history of the McCarran Act. Moreover, adoption of the construction urged by the Commission would in fact lead to the serious impairment of state regulation.

The proviso itself is a complete answer to the Commission's contention. This proviso expressly defines the "extent" to which the Federal Trade Commission Act is to be applicable—"to the extent that such business is not regulated by State law." The Commission would change it to read—"to the extent that such business is not regulated by [inconsistent] State law." Congress could not have intended to leave any such important issue dependent on construction.

Consideration of the purpose for which Congress enacted the McCarran Act further refutes the Commission's contention. Prior to the *South-Eastern Underwriters* decision,

insurance was not considered to be commerce, and the states had full responsibility for the regulation of this business, unrestricted by the commerce clause. The prime purpose of the McCarran Act was to repose in the states both the authority and the responsibility for the regulation of the business of insurance.

To accomplish that purpose, Congress removed all commerce clause limitations on state regulation of insurance. In Section 3(a) Congress established a three-year moratorium during which the Federal Trade Commission Act and the other federal Acts there named "shall not apply" to the business of insurance. Thereafter, the proviso of Section 2(b) became operative to the extent there described.

Certainly Congress did not remove all commerce clause limitations and invite the states to legislate in the areas covered by the federal Acts named in Section 3(a) and the proviso of Section 2(b), under the conception that the states would obtain exclusive jurisdiction only when state laws conflicted with the federal Acts. State regulatory enactments to be effective in this field necessarily had to be consistent with large areas of existing federal law. Congress was not seeking to establish duplicative state and federal regulation of this particular business, to an extent greater than in other fields of business. Nor did Congress intend the moratorium as an invitation to the states to enact only inconsistent legislation. Congress knew that in many instances state laws would be consistent with the federal Acts. Congress intended that under the proviso the federal Acts would be inapplicable in either event.

The states so understood the McCarran Act, and accordingly a great majority of them have enacted the Model State Fair Trade Practices Act, which follows the pattern

of the Federal Trade Commission Act. More recently, more than half of the states have adopted a set of Rules Governing Advertisements of Accident and Sickness Insurance, which describe in detail the standards to be applied in determining whether such advertising is misleading, and which provide for periodic examination of all such advertising used by each company. Because of their broad supervisory powers over insurance companies, the states customarily handle all complaints with respect to advertising through informal procedures, and the various states have on numerous occasions used this means to correct insurance advertising practices which they considered to be improper.

The Senate debate on the proviso also demonstrates conclusively that Congress intended the Federal Trade Commission Act to be inapplicable to the extent that the states have legislated, regardless of whether such legislation is consistent or inconsistent with the federal Act.

Moreover, although the Commission contends that there could be no inconsistency either in the laws regulating advertising or in their administration, its own argument proves just the contrary. Most of the state laws, like the Federal Trade Commission Act, are broadly phrased and are enforceable initially through administrative procedures. Conflicts in interpretation and application to particular advertising would be inevitable. The Commission says that *res judicata* would apply so as to prevent conflicting orders. If this is accepted as sound, it is difficult to conceive of a more direct impairment of state regulation. Should the Commission enter its order first, it would be binding on all of the states. No matter what their independent judgment might be, state regulatory agencies could not disagree in any respect on either the merits or the relief to be directed. Actually the conflict would cut much deeper. On the Com-

mission's theory, it would always have jurisdiction in the absence of a state order. The very absence of state action, however, may well mean that the state has investigated the practice and determined that it is not objectionable.

II

The Commission's contention that the proviso of Section 2(b) should be construed to make the Federal Trade Commission Act applicable to the extent that insurance is not "effectively" regulated by state law is in direct conflict with the language and the legislative history of the proviso. Moreover, the Commission is in error in asserting that a state cannot effectively regulate insurance advertising reaching its citizens through interstate channels.

Again the Commission is seeking to amend the proviso. Its construction would require the addition of the word "effectively," so as to make the proviso read that the Federal Trade Commission Act "shall be applicable to the business of insurance to the extent that such business is not [effectively] regulated by State law." Not only does such a construction find no support in the statute, but it is refuted by the legislative history.

In addition, it is clear that the states can effectively regulate advertising which has moved in interstate commerce. In the cases at bar, both companies are licensed in every state in which they advertise and sell insurance. It is not material in the view of the majority of the Commission whether each state has a statute regulating the insurance advertising reaching its citizens. It is beyond dispute that a state has the power to regulate insurance transactions having consequences within its borders even though interstate commerce is involved.

In essence, the Commission is here arguing that where interstate insurance transactions are involved federal regulation is more effective than state regulation. That question, along with others, was fully debated by Congress when it considered the McCarran Act, and was resolved in favor of the states.

ARGUMENT

Introduction

The proviso of Section 2(b) of the McCarran Act states that the Federal Trade Commission Act and the other federal Acts there named "shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

In the two cases at bar each company is licensed in every state in which it advertises, sells policies, and conducts its business. Its business is conducted through agents who are similarly licensed. Each state has a law regulating the insurance advertising which reaches its citizens whether the advertising comes from within or from without the state's borders. Despite these state regulatory controls the Federal Trade Commission has held that it has jurisdiction over all advertising used by the two companies in connection with the interstate sale of insurance.

In its opinion (A.R. 73-80)[1] and in the Courts below (A.R. 116, N.R. 220-221), the Commission sought to support its interpretation of the McCarran Act on the theory that every interstate advertising transaction is divided

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[1] "A.R." refers to the printed record in American Hospital, "N.R." to the record in National Casualty.

into two separate aspects: one interstate, and the other intrastate. The Commission asserted that the states lacked the constitutional power to regulate the interstate aspect.

The Commission has now shifted its position. It still contends for the same broad jurisdiction, but it turns to different supporting arguments. In its brief in this Court, the Commission concedes that the states have the power to regulate interstate insurance transactions uninhibited by the commerce clause (Pet. Br. 38, 41, 55). It also concedes that under the proviso of Section 2(b) the Federal Trade Commission Act would be inapplicable in the event of a conflict with state laws (Pet. Br. 37, 39, 49). The Commission argues, however, that the proviso should be construed to mean that the Federal Trade Commission Act is to apply to insurance to the extent that such business is not regulated by "inconsistent" state law (Pet. Br. 49-52); and it says that here the laws are consistent and there could be no conflict in their interpretation and administration (Pet. Br. 35-41). The Commission also contends that the proviso should be construed to mean that the Federal Trade Commission Act is to apply to insurance to the extent that such business is not "effectively" regulated by state law; and it says that the states cannot effectively regulate interstate advertising (Pet. Br. 41-49).

We submit that each of these arguments is entirely without foundation. They do violence to the language of the McCarran Act. They would bring about a serious impairment of state regulation. And they misconceive the power of a state to protect its citizens against practices having consequences within its borders whether or not interstate commerce is involved.

I

The Commission's Contention that the Proviso of Section 2(b) Should be Construed to Mean that the Federal Trade Commission Act Shall be Applicable to the Business of Insurance to the Extent That Such Business Is Not Regulated By "Inconsistent" State Law is in Direct Conflict with the Language, the Purpose and the Legislative History of the McCarran Act; Moreover, the Commission's Theory would In Fact Lead to Constant and Serious Impairment of State Regulation.

A. The Language of the Proviso

The language of the proviso of Section 2(b) completely refutes the Commission's contention. This proviso expressly defines the "extent" to which the Federal Trade Commission Act is to be applicable. It does not say that the Federal Trade Commission Act shall be applicable "to the extent" that insurance transactions are "in" interstate commerce, or to the extent that the federal Act is consistent with state regulation, or to the extent that the Commission might consider state regulation to be ineffective. It says that the Federal Trade Commission Act is to apply to insurance "to the extent that such business is not regulated by State law." This can mean only one thing. If the matter is not regulated by state law, the Federal Trade Commission Act is to apply. If the matter is regulated by state law, the Federal Trade Commission Act is not to apply.

The construction advocated by the Commission would require the addition of the word "inconsistent," so as to make the proviso read that the Federal Trade Commission Act "shall be applicable to the business of insurance to

the extent that such business is not regulated by [inconsistent] State law." There simply is no basis for any such construction. Certainly had Congress intended so to restrict the proviso, it could and would have used language more clearly expressing such purpose. Congress could not have intended to leave any such substantial issue dependent on construction, nor could this have been a matter of Congressional oversight.

B. The Purpose of the McCarran Act

The conclusion that the Federal Trade Commission Act is not to apply to transactions which are regulated by state law (whether consistent or inconsistent) is required not only by the language of the proviso but also by a consideration of the purpose for which Congress enacted the McCarran Act.

For 75 years prior to the *South-Eastern Underwriters* decision, insurance was not considered to be commerce. As a result, the federal government had made no attempt to regulate this important business. Full responsibility in this regard had rested on the states, and in meeting that responsibility the states had adopted comprehensive systems of insurance regulation. Under these circumstances the states had "inevitably exerted their powers to limits and in ways not sought generally to be applied to other business held to be within the reach of the commerce clause's implied prohibition." *Prudential Insurance Co. v. Benjamin*, 328 US 408, 417 (1946).

The *South-Eastern Underwriters* decision cast doubt on the validity of many of these state statutes, and also created problems with respect to the application to insurance of various federal statutes which pertained to commerce generally, but which Congress had adopted without having

insurance in mind. Congress enacted the McCarran Act to eliminate this confusion. The Act's basic purpose is clearly expressed in Sections 1 and 2(a). Section 1 declares "that the continued regulation and taxation by the several States of the business of insurance is in the public interest." Section 2(a) provides that "the business of insurance * * * shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

This purpose is further carried out by Section 3(a) and the proviso of Section 2(b). Section 3(a) established a moratorium during which the Federal Trade Commission Act and the other federal Acts there named "shall not apply" to the business of insurance. After the moratorium, the proviso of Section 2(b) came into play, stating that those statutes "shall be applicable" to insurance to the extent there described.

The intent of Congress is thus made clear. Its obvious purpose was to repose in the states not only the authority but also the responsibility for the regulation of this business. That is the meaning of Sections 1 and 2(a). Congress wanted to make certain, however, that the insurance business would be regulated within the areas covered by the statutes named in Section 3(a) and the proviso of Section 2(b). Since this was to be the responsibility of the states, Congress gave them three years during which to revise their laws to undertake that responsibility. To the extent that the states did so, the federal Acts were not to apply; to the extent that the states did not do so, the federal Acts were to apply so as to eliminate the possibility of a regulatory void in these areas.

The construction urged by the Commission would do violence to this entire statutory pattern. Certainly Congress did not remove all commerce clause limitations, and invite

the states to legislate in the areas covered by the federal Acts named in Section 3(a) and the proviso, under the conception that the states would obtain exclusive jurisdiction only where state laws conflicted with the federal Acts. State regulatory enactments to be effective in this field necessarily had to be consistent with large areas of existing federal law. The purpose of Congress in the McCarran Act was not to invite the states to legislate so as to establish duplicative state and federal regulation over the interstate aspects of this particular business, to an extent greater than in other fields of business. Rather, its purpose was to return to the states the authority and the responsibility for the regulation of the insurance business which had been theirs prior to the *South-Eastern Underwriters* decision.

Nor is it reasonable to assume, as the Commission apparently does, that Congress intended the moratorium as an invitation to the states to adopt only inconsistent legislation and the proviso as rendering the Federal Trade Commission Act inapplicable only in that event. The Federal Trade Commission Act broadly proscribes all "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." The Commission itself agrees that it is "inconceivable" that the states would enact statutes affirmatively sanctioning false insurance advertising (Pet. Br. 37, fn. 24). This is of course equally true with respect to most of the great number of practices prohibited by the Federal Trade Commission Act. Congress knew all of this. Obviously therefore Congress contemplated that the states would enact a considerable amount of consistent legislation, as well as some inconsistent legislation, and intended that under the proviso the federal Acts would be inapplicable in either event. Although the Commission stops short of saying so, it implies that in the proviso Congress was concerned solely with state laws authorizing rating-bureau activities in the field of casualty

insurance, which laws would be inconsistent with the Sherman Act (Pet. Br. 20, 32, 53, 60). Had this been the only purpose of Congress, surely it would have worded the proviso to say so.

It is significant to note that the states uniformly understood the statute as inviting them to assume the responsibility for the regulation of insurance, and acted accordingly. Following the enactment of the McCarran Act, the states, at the suggestion of the National Association of Insurance Commissioners, adopted several types of uniform insurance laws which were specifically designed to legislate in the areas covered by the Federal Trade Commission Act and the other federal statutes named in the proviso. Most pertinent for present purposes is the Model State Fair Trade Practices Act. That Act is patterned after the Federal Trade Commission Act, and specifically prohibits misleading insurance advertising as well as other unfair or deceptive acts or practices. (See, for example, the Kansas statute, appended to petitioner's brief.) This Model Act has now been adopted by 41 states, Alaska, Hawaii and Puerto Rico.

Moreover, in December, 1955, the National Association of Insurance Commissioners promulgated a set of Rules Governing Advertisements of Accident and Sickness Insurance, which implement the state statutes by spelling out in detail the standards to be applied in determining whether advertising is misleading. A copy of these Rules is reproduced as an appendix hereto (*infra*, pp. 1a to 12a). Already 27 states have adopted these Rules, with others expected to follow. It is to be noted that among other things the Rules require each company to file annually a certificate stating that it has complied with the Rules and the underlying state statute. Also, each company is required to maintain a complete file of all advertising used, which is subject

to regular and periodical inspection by the state Insurance Department (*infra*, p. 11a).[2]

Obviously the states undertook this vast regulatory program in the belief that the responsibility for insurance regulation rested on them. The Federal Trade Commission would have it, however, that all of this regulation is merely duplicative of the Federal Trade Commission Act and has had no effect whatsoever on the Commission's jurisdiction.

One more observation may be pertinent in this connection. Throughout its brief, the Commission repeats the statement that "the mere enactment of state laws" prohibiting misleading advertising should not deprive it of jurisdiction. It also suggests as an issue here, the absence of a showing that the states had taken action against the advertising in the two cases at bar (Pet. Br. 36). This case of course involves the meaning of the McCarran Act, not the extent of enforcement of the state laws. However, we do not wish to leave the impression that the states have been inattentive in the field of enforcement. Nor do we read the Commission's brief as inferring this to be the situation. We consider it inappropriate to state here any position on the merits of the advertising involved in the two cases at bar or to attempt to judge regulatory action or inaction. There is nothing in the record which bears on state enforcement in general. Nor could we in a document of this kind attempt to list all action, formal or

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[2]

Additionally, the National Association of Insurance Commissioners has prepared an Interpretive Guide which the Association has recommended for informal use by the various state Insurance Departments and the companies. The Guide is considerably more detailed than the Rules and sets out many examples of objectionable advertising of accident and sickness insurance.

informal, taken by the several states in correcting misleading advertising. It can fairly be said, however, that every state Insurance Commissioner investigates all complaints against insurance companies made to his Department, as well as improper practices brought to his attention through other means. This applies equally to advertising as it does to any of the multitude of other insurance activities which are regulated by the states.

The insurance business is extremely competitive. There are hundreds of insurance companies doing business through thousands of agents. Whenever a company engages in an unfair competitive practice, agents of competing companies are quick to bring the matter to the attention of the state Insurance Department. Policyholders within a state have ready access to their state Insurance Department for the purpose of complaining about any practice which they consider unfair. Most all of these matters are handled informally. Formal procedures are available if considered to be desirable or necessary. Complaints of substance are handled directly by the Insurance Commissioner or a member of his staff with the company involved. Since a state Insurance Department maintains constant supervision over the companies doing business in the state and has substantial enforcement powers, often including the authority to revoke a company's license for any law violation, this type of action brings immediate correction where necessary. This informal procedure may be readily applied to correct insurance advertising practices considered to be misleading or otherwise improper. State Insurance Commissioners have on a number of occasions taken such action.

C. The Legislative History of the McCarran Act

Since the language of the proviso of Section 2(b) is clear,

it is unnecessary under well established principles to turn to its legislative history as an aid to construction. Reference to this history, however, makes doubly clear the error in the Commission's attempted construction.

The proviso was added in conference. Consequently neither the Committee Reports nor any of the earlier history deals with it. The Conference Report (91 Cong. Rec. 1357) does not comment on the proviso, and the House approved the Report without debate (91 Cong. Rec. 1395-1396). The sole discussion of the proviso occurred in the Senate debate on the Conference Report. This debate unequivocally demonstrates that: (1) Congress intended the moratorium to give the states time to legislate in the areas covered by the statutes named in the proviso. (2) Congress intended that to the extent the states did so the Federal Trade Commission Act and the other statutes listed in the proviso should not be applicable. (3) Congress intended this result to follow regardless of whether the states enacted consistent or inconsistent statutes. (4) Congress rejected the notion that a state cannot effectively regulate interstate insurance transactions having consequences within its borders. The following excerpts, which include statements by Senators McCarran and Ferguson, who were co-authors of the bill and also Senate conferees, are pertinent (all emphasis added):

> "**MR. MURDOCK.** So that during the moratorium it is intended, is it not, that the States shall affirmatively step into the regulation of the insurance business?
>
> "**MR. McCARRAN.** That is correct.
>
> "**MR. MURDOCK.** And it is intended that on the expiration of the moratorium the Sherman Act, the

Clayton Act, and the other acts mentioned will again become effective except—

"**MR. McCARRAN.** Except as the States themselves have provided regulations."[3]

• • •

"**MR. PEPPER.** • • • Does that mean that after January 1, 1948, the States may determine whether or not the Sherman and the other acts become applicable to the business of insurance?

"**MR. McCARRAN.** The answer to that question is 'Yes.' During the 3-year moratorium the States may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, to the extent that they regulate they will have taken the business of insurance in the respective States out from under the Sherman Anti-trust Act, the Clayton Act, and the other acts. If during the moratorium the States do not enact legislation for regulatory purposes, then on January 1, 1948, the Sherman Act, the Clayton Act, and the other acts will become immediately applicable."[4]

• • •

"**MR. PEPPER.** • • • If there are reasons which make proper a moratorium for 3 years under the understanding that at the end of such a period of time the Clayton Act, the Sherman Act, and the other acts shall go into effect, well and good, but, so far as I am concerned, I shall not consent to postponing until

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[3] 91 Cong. Rec. 1442.

[4] 91 Cong. Rec. 1443.

January 1, 1948, the effective date of the law, and *according to the States the privilege of enacting some mild form of legislation which they may call regulatory,* thereby defeating the purpose of the Supreme Court decision and defeating the act itself. Apparently the conference report goes further than I had understood it to go. It does not stop with a moratorium at the end of 3 years. *At the end of 3 years the moratorium would continue if in the meantime a State had regulated the business to any extent whatever.* That would defeat the Supreme Court decision.

"**MR. McCARRAN.** The moratorium would not be continued; but *if in the meantime the States themselves had regulated the business of insurance, the Sherman and Clayton Acts and the other acts would not become effective.*"[5]

* * * * *

"**MR. FERGUSON.** * * * After the moratorium has expired, if a State has not legislated on the subjects covered by the three acts to which reference has been made, those acts shall be applicable to the business of insurance. *But insofar as the State is concerned which has specifically legislated on the subject, the three acts shall not apply.*"[6]

* * *

"**MR. PEPPER.** . . . the legal effect of the proviso which the Senator has just read is that a State can absolutely prevent the applicability of the Sherman Antitrust Act and the Clayton Act to insurance com-

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[5]
91 Cong. Rec. 1443.

[6]
91 Cong. Rec. 1443.

panies doing business in the State *by passing a State act which will make combinations and restraints of trade unlawful in that State.* As a practical matter, we know that the States cannot and will not enforce these laws against these insurance companies.

"MR. WHITE. Mr. President, is it not perfectly clear that the force and effect of these Federal statutes may be applicable and shall be applicable to whatever extent the State law fails to occupy the ground and engage in regulation? As I take it, there are two jurisdictions.

"MR. McCARRAN. There always are.

"MR. WHITE. There is the State, authorized to act to whatever extent seems proper.

"MR. McCARRAN. That is correct.

"MR. WHITE. Then the Federal Government can come in, and it does come in and may legislate beyond the limit of the State legislation.

"MR. McCARRAN. To the extent that the State does not regulate.

"MR. WHITE. To the extent that the State does not regulate.

"MR. MURDOCK. Mr. President, does the Senator from Maine take the position that, under the conference report, it becomes necessary for the Congress to act again affirmatively, subsequent to any State action taken?

"MR. WHITE. Not at all; that is not my view of the matter at all. My view is that the State may regulate. If however, the State goes only to the point indicated, then these Federal statutes apply throughout the whole field beyond the scope of the State's activity.

"MR. McCARRAN. That is a correct statement.

"MR. MURDOCK. Without any subsequent action on the part of Congress?

"MR. WHITE. Without any subsequent action on the part of Congress.

"MR. MURDOCK. I think that therein lies a very important feature of this whole matter. I agree thoroughly with the Senator from Maine that insofar as the States step into the picture affirmatively and act by regulation, they may do so. As the Senator from Wyoming has said, we convey no authority, we simply recognize their right to regulate. Insofar as they fail to cover the same ground covered by the Sherman Act and the Clayton Act, those acts become effective again."[7]

This legislative history shows conclusively that Congress had in mind no such distinction between consistent and inconsistent state regulation as the Commission suggests. Repeatedly during the debate several Senators, including Senators McCarran and Ferguson, made the flat statement that under the proviso the Federal Trade Commission Act and the other federal Acts mentioned would be inapplicable to the extent that the states legislated in those areas. In

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[7]
91 Cong. Rec. 1444.

no instance did the Senators in any way indicate that this result would turn on whether the state laws were consistent or inconsistent with the federal Acts.[8] Certainly if they had intended any such important distinction, they would have said so.

Even more significant, Senator Pepper at one point said that "the legal effect of the proviso which the Senator has just read is that a State can absolutely prevent the applicability of the Sherman Antitrust Act and the Clayton Act to insurance companies doing business in the State by passing a State act which will make combinations and restraints of trade *unlawful* in that State"; and Senator McCarran agreed with him (91 Cong. Rec. 1444, emphasis supplied). At another point, Senator Pepper objected to "according to the States the privilege of enacting some mild form of legislation which they may call regulatory," and argued that "at the end of 3 years the moratorium would continue if in the meantime a State had regulated the business *to any extent whatever*"; and Senator McCarran answered that, although the moratorium would not

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[8]

The Commission refers to one point where Senator Ferguson said that, if the states were to adopt legislation contrary to the federal statutes named in the proviso, the state laws would be binding (Pet. Br. 59). From this the Commission seeks to draw the conclusion that Senator Ferguson meant that the federal Acts would be inapplicable *only* in the event of inconsistency (Pet. Br. 64). No such conclusion is justified. Senator Ferguson was at that point merely answering a question addressed to him as to what the result would be in the case of inconsistent state laws. There is nothing in his statement to imply that he thought the result would be otherwise in the case of consistent state laws. As shown by the excerpts which we have quoted, Senator Ferguson flatly stated that after the moratorium if a state had not legislated on the subject the three federal Acts would be applicable, "but insofor as the State is concerned which has specifically legislated on the subject, the three acts shall not apply" (91 Cong. Rec. 1443).

continue, "if in the meantime the States themselves had regulated the business of insurance, the Sherman and Clayton Acts and the other acts would not become effective" (91 Cong. Rec. 1443, emphasis supplied).

At still another place, Senator Pepper pointed out that under the proviso the Federal Trade Commission Act and the other federal Acts would "not apply to the business of insurance except in a State which has not *regulated* the insurance business *or* to the extent a State has not *denied* the effect of such Federal acts"; he said he might not object if the proviso contained the limitation that the state regulation must be consistent with the federal Acts; but he did object to permitting the states to render the federal Acts inapplicable by means of inconsistent legislation; and Senator McCarran answered that "the Senator undoubtedly recognizes the fact that the Congress of the United States would not attempt to tell a State how and upon what subject it should legislate" (91 Cong. Rec. 1478, emphasis supplied).

All of this is in direct conflict with the Commission's argument that under the proviso only inconsistent state laws will render the Federal Trade Commission Act inapplicable. It is, in fact, difficult to see how the Commission can persist in its contention in the face of these clear indications of Congressional intent to the contrary.[9]

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[9]

To the extent that the present issue has been before the federal courts, the rulings are uniformly inconsistent with the Commission's view. In addition to the two decisions here under review, three other federal Courts of Appeals and two federal District Courts have had occasion to consider the meaning of the proviso of Section 2(b). North Little Rock Transp. Co. v. Casualty Reciprocal Exchange, 85 F Supp 961 (E.D. Ark. 1949), aff'd 181 F 2d 174 (C.A. 8, 1950), cert. den. 340 US 823; Crafts v. Federal Trade Commission, 244 F 2d 882 (C.A. 9, 1957), reversed on other grounds, 78 S Ct 33;

D. The Commission's Theory Would Lead to Constant and Serious Impairment of State Regulation

We have pointed out above that under the proviso of Section 2(b) the Federal Trade Commission Act is inapplicable in the event of either consistent or inconsistent state legislation. We now point out that, in addition, the Commission's contention that there could be no state-federal conflict either in the laws regulating misleading advertising or in the administration of those laws is wholly illusory. Its own argument proves just the contrary.

As the Commission agrees, most of the state laws, like the Federal Trade Commission Act, are couched in broad terms and are enforceable initially through administrative interpretation and application. In dealing with concepts as indefinite as "unfair methods of competition," or "unfair or deceptive acts or practices," or "misleading advertising," disagreements between state and federal administrative authorities would of course be inescapable. In the cases at bar, for example, the Commission disagreed with its Hearing Examiners on the merits as well as on jurisdiction. In *American Hospital* the Hearing Examiner held that none of the advertising was misleading (A.R. 26-58), but the Commission concluded it was misleading in three respects (A.R. 60-68). In *National Casualty* the Hearing Examiner found that one of the five charges of misrepresentation was not supported (N.R. 187-203), but the Commission concluded that all charges were proved (N.R. 204-210).

Miley v. John Hancock Mutual Life Ins. Co., 148 F Supp 299 (D. Mass., 1957), aff'd 242 F 2d 758 (C.A. 1, 1957), cert. den. 78 S Ct 38. In each instance, the court has either held or strongly implied that under this proviso state regulation renders the federal statutes inapplicable. In no instance did the court seek to distinguish between consistent and inconsistent state regulation, or suggest that the states could not effectively regulate interstate insurance transactions.

Similar conflicts between state and federal interpretations would be inevitable. As this Court said in *Garner v. Teamsters, Chauffeurs and Helpers, etc.*, 346 US 485, 490-491 (1953): "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

The Commission seeks a way around this dilemma. Its argument runs as follows: Since the statutes are consistent, there would be no conflict until a state enters an order against particular advertising (Pet. Br. 49-50). The Commission points out that the states had entered no orders against the advertising in the two cases at bar (Pet. Br. 36). Once the Commission files its complaint, however, a state could not dislodge it from jurisdiction by filing a similar complaint, although both could proceed simultaneously (Pet. Br. 50, fn. 32). The doctrine of *res judicata* would apply to prevent inconsistent orders *(Ibid.)*.[10]

It is difficult to conceive of a more direct impairment of state regulation. Presumably the only instance in which the Commission would lack jurisdiction would be when a state held a hearing and concluded that the advertising was proper and the complaint should be dismissed. If the state entered its order first, the Commission could enter an identical one. But if the Commission's order came first, the states could no longer exercise their independent judgment. Perhaps they could enter an identical order. But they could not disagree in any respect on either

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In its decisions and in the Courts below, the Commission said that in the event of conflict its order would supersede a state's order (A.R. 75, Pet. Br. 37, fn. 24). In its petition for certiorari (No. 435, p. 18, fn. 10), it said that the state adjudication would be controlling. It now says that the first order entered would control.

the merits or the relief to be directed. This is the very kind of supersession of state regulation which the Commission elsewhere in its brief concedes is not permitted by the McCarran Act.

Actually the conflict would cut much deeper than this. The Commission's theory is that the very absence of a formal proceeding and final order in a state will give it jurisdiction, since in that event there can be no conflict. This overlooks the fact that the absence of a formal proceeding does not necessarily suggest that the enforcement agency is unaware of the matter. It may as well suggest that the agency has investigated fully and concluded there is nothing wrong. Under the Commission's theory nothing less than an order by the state agency would suffice even though it recited no more than a finding that no violation had occurred. Such a course of conduct requires the formalizing of every complaint. In this additional respect, therefore, the Commission's theory would lead to the serious impairment of state regulation.

The Commission also argues that the word "regulation" in the proviso may require something more than "legislation," and that in the case of state statutes broadly prohibiting "unfair or deceptive acts or practices" and requiring administrative implementation, there is no "regulation" within the meaning of the proviso until a state has entered an order in an individual case (Pet. Br. 52-55). Does the Commission imply that its jurisdiction under the proviso may depend on the forum designated by the state statute so that regulation would be complete and adequate if state legislation was enforceable directly in the courts and conversely inadequate if enforceable initially by administrative proceedings subject to court review? There is certainly nothing in the proviso to support any such strained

construction. The proviso uses the words "regulated by State law." Obviously this means "legislation."[11]

Both logical and practical considerations dictate but one conclusion. The proviso means that the Federal Trade Commission Act is to apply to the extent there is no state legislation, but is not to apply to the extent that there is state legislation. Congress made no distinction between consistent and inconsistent state and federal legislation. To read such a distinction into the statute would be directly contrary to the clearly expressed intent of Congress, and would in addition lead to serious impairment of state regulation.[12]

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[11]

The Commission refers (Pet. Br. 58) to a statement of Senator McCarran that "if [the states] do enact such legislation, to the extent that they regulate they will have taken the business of insurance in the respective States out from under the Sherman Anti-trust Act, the Clayton Act, and the other acts" (91 Cong. Rec. 1443). The Commission says this suggests that the Senator was distinguishing between "legislation" and "regulation." To the contrary, the language demonstrates that he was treating the two words as synonymous. In the next sentence, he said "if during the moratorium the States do not enact legislation for regulatory purposes, then on January 1, 1948, the Sherman Act, the Clayton Act, and the other acts will become immediately applicable." The Senate debate on the proviso (supra, pp. 19 to 23) makes it clear beyond doubt that Congress meant "regulated by State law" to mean "legislation."

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The Commission suggests that the problem in the cases at bar is somewhat comparable to that in United States v. Frankfort Distilleries, Inc., 324 US 293 (1945), Connecticut Light and Power Co. v. Federal Power Commission, 324 US 515 (1945), and United States v. Public Utilities Commission of California, 345 US 295 (1953). Those cases are not in point. The problem here is the meaning of the proviso of Section 2(b). Those cases involved no provision even remotely comparable.

II

The Commission's Contention that the Proviso Should Be Construed to Mean that the Federal Trade Commission Act is to Apply to Insurance to the Extent that Such Business is Not "Effectively" Regulated By State Law Is in Direct Conflict with the Language and the Legislative History of the Proviso; and the Commission is in Error in Asserting that a State Cannot Effectively Regulate Insurance Advertising Reaching Its Citizens Through Interstate Channels.

The Commission now concedes that the commerce clause does not inhibit state power over insurance (Pet. Br. 38, 41, 55). It argues, however, that the states cannot effectively regulate interstate insurance transactions; that without federal regulation there would be a void in regulation; and that the proviso should be construed to mean that the Federal Trade Commission Act shall apply to the extent that the business is not "effectively" regulated by state law (Pet. Br. 41-49).[13]

We point out first that here again the Commission is seeking to add language to the proviso. The proviso states that the Federal Trade Commission Act "shall be applicable to the business of insurance to the extent that such

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Comparing the Commission's argument on the ineffectiveness of state laws with its argument that only inconsistent state laws dislodge federal jurisdiction leads to illogical results. If a state's consistent laws are ineffective in the case of interstate transactions, so are its inconsistent laws. The consequence would be to attribute to Congress the purpose of rendering federal laws inapplicable where a state adopts statutes in conflict with federal policy even though those statutes may be ineffective to protect the public, but of providing for concurrent regulation as necessary to protect the public where the state and federal laws are consistent. Congress could not have intended any such result.

business is not regulated by State law." The Commission would have it read that the federal Act "shall be applicable to the business of insurance to the extent that such business is not [effectively] regulated by State law." There is no basis for any such construction in either the statute or its legislative history. The Senate debate quoted earlier herein (*supra*, pp. 20 to 21) shows that Senator Pepper criticized the proviso on the ground that it would render the federal Acts inapplicable even if state regulation were ineffective. Congress rejected this criticism and the Act was passed, demonstrating that Congress concluded on balancing all of the factors that state regulation of insurance is preferable to federal regulation.[14]

We turn now to the Commission's broad assertion that the states cannot effectively regulate the advertising here involved because it has moved in interstate commerce, an assertion which we vigorously deny. In the two cases at bar, both companies are licensed in every state in which they advertise and sell insurance. In the present posture of the cases, it is not disputed that each state has a statute which regulates the insurance advertising reaching its citizens. There can therefore be no question of the power of each state to reach the companies and enforce its laws.

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[14]

The Commission's construction of the proviso would in fact render it meaningless insofar as concerns the Federal Trade Commission Act. The Commission says that it has jurisdiction over all insurance transactions which are "in" interstate commerce, on the theory that the states cannot effectively regulate such interstate transactions (Pet. Br. 44-45). The Federal Trade Commission Act, however, applies only to practices "in" interstate commerce. Federal Trade Commission v. Bunte Bros., 312 US 349 (1941). Hence, if the Commission's position were sound, the McCarran Act would have no effect on Commission jurisdiction since the states could never effectively regulate the only conduct which the Commission has power to regulate.

Nor can there be any doubt that each state is fully capable of protecting its citizens against misleading advertising whether it comes from within or from without its borders.[15]

The Commission refers to due process limitations as exemplified by the line of cases beginning with *Allgeyer v. Louisiana*, 165 US 578 (1897), and points out that the McCarran Act did not remove these limitations (Pet. Br. 42, 46-47). At no time, however, has the due process clause in any way prevented a state from regulating transactions originating elsewhere but having consequences within its borders. Even at the time of *Allgeyer*, it was consistently held that a state could regulate a contract with a foreign insurance corporation if the contract was executed within the state. *Hooper v. California*, 155 US 648 (1895); *Nutting v. Massachusetts*, 183 US 553 (1902). And the more modern cases establish beyond doubt the power of a state consistent with the due process clause to regulate insurance transactions affecting its citizens even though interstate commerce is involved and even though the regulation may have extra-state repercussions. *Osborn v. Ozlin*, 310 US 53 (1940); *Hoopeston Canning Co. v. Cullen*, 318 US 313 (1943); *Robertson v. California*, 328 US 440 (1946); *Watson v.*

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The Commission raises questions as to whether the state of origin can constitutionally or efficaciously regulate advertising sent into other states (Pet. Br. 45-47). It also discusses the problem where a company is not licensed in a state in which policies are advertised and sold and says that the decisions below would preclude application of the federal Act there also (Pet. Br. 47-48). We do not discuss those questions because they are not before the Court. In both cases, the company is licensed and has agents in every state in which it does business. The reference to the holdings below is inaccurate. Both courts decided the cases on the facts before them, and indeed expressly limited their opinions to those facts (A.R. 116, N.R. 225).

Employers Liability Assurance Corp., 348 US 66 (1954); *McGee v. International Life Ins. Co.*, 78 S Ct 199 (1957).[16]

> "The Commission says that such state regulation of advertising originating elsewhere would reach only the symptom and not the source of the evil (Pet. Br. 47). This is wholly fallacious. Concoction of false advertising without dissemination is no evil that needs regulation. Under the system of state regulation, there can be control at the point of origin or dissemination as well as the point of delivery or reception, and thereby the evil is controlled and eliminated in its entirety. Actually, insofar as concerns a particular state, local regulation is more effective since state officials are closer to home and more receptive to complaints from the state's citizenry."

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[16]

The Commission refers to statements by Senators Ferguson and O'Mahoney that the McCarran Act would not permit a state to regulate "in the field of interstate commerce" (Pet. Br. 59-60, 61, 64). When read in context, however, it is obvious that the Senators were referring only to the question of a state's power to regulate for another state (91 Cong. Rec. 1483, 1484). Certainly they were not denying, and in fact could not deny, the power of a state to regulate transactions emanating from another state but having their consequences within the regulating state. In any event, we do not understand the Commission to deny that power here.

The Commission also points to a statement by Senator O'Mahoney that after the moratorium the federal Acts named in the proviso would "come to life again" (91 Cong. Rec. 1483). The Commission construes this to mean that after the moratorium the federal Acts would become "fully applicable" to insurance (Pet. Br. 60, 64). The statement is subject to no such construction. When read in context, it is clear that Senator O'Mahoney was referring only to the fact that after the moratorium these statutes would come to life to the extent that the states had not regulated. The Commission itself concedes that the federal Acts did not become "fully applicable" to insurance after the moratorium.

The main thrust of the Commission's entire argument is of course that federal regulation is more effective than state regulation. That question may be debated endlessly but is not in issue here. It was precisely the question before Congress when it considered the McCarran Act and was resolved in favor of the states. As this Court pointed out in *Prudential Insurance Co. v. Benjamin,* 328 US 408, 430-431 (1946), Congress had "full knowledge of the nation-wide existence of state systems of regulation" and "of the fact that they differ greatly in the scope and character of the regulations imposed"; hence it must be concluded that Congress "in effect declared, that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance, by the national public interest." We submit that to adopt the views of the Federal Trade Commission would turn aside this Congressional decision by means of strained constructions which do violence to the words and intent of Congress. The Commission's position, based on arguments as to the efficacy of state regulation versus federal regulation, if accepted, will result in the same conflicts and confusion that Congress undertook to resolve and eliminate by the adoption of the McCarran Act.

CONCLUSION

For the foregoing reasons, the judgments of the Courts below should be affirmed.

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